(18,907.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 267.

CLARENCE T. BIRKETT, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA BANK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Remittitur from court of appeals	1	1
Appeal book on appeal to court of appeals	5	2
Statement under rule 41	6	2
Summons	7	3
Complaint	8	3
Answer	9	4
Notice of findings	11	5
Findings of fact and conclusions of law	12	6
Judgment of trial term	15	8
Memoranda of opinion at trial term	16	8
Amended exceptions and notice of filing	17	9
Notice of appeal to appellate division	19	10
Case and exceptions	20	11
Statement of proceedings	20	11
Jury waived	21	11
Motion for judgment, &c	21	11
Plaintiff rests	22	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1903.

	Original.	Print
Evidence for defense	22	11
Exhibits offered	22	11
Testimony of Clarence T. Birkett	22	12
Exhibit E—Letter of Fox to Baldwin, Nov. 6, 1899	23	12
Answer of Baldwin to Fox, Nov. 9, 1899	24	12
F—Letter of Fox to Baldwin, Nov. 17, 1899	24	13
Answer of Baldwin to Fox, Nov. 18, 1899	25	13
1—Letter of Manhattan Railway Advertising Co. to Russell & Birkett, March 27, 1899	25	13
2—Letter of Russell & Birkett to the Columbia Bank, April 4, 1899	27	14
A—Adjudication in bankruptcy	28	15
B—Discharge in bankruptcy	29	16
C—Abstract from schedules of bankrupts	31	17
D—Notice to creditors of bankrupts	32	18
Justice's certificate to case and exceptions	33	18
Stipulation settling case in appellate division	33	18
Order of affirmance	35	20
Judgment of affirmance	36	20
Affidavit of no opinion by appellate division	37	21
Notice of appeal to court of appeals	37	21
Stipulation settling case in court of appeals	38	22
Order for judgment on remittitur	40	22
Judgment on remittitur	43	23
Opinion of court of appeals	45	24
Writ of error	52	30
Petition for writ of error	55	31
Clerk's certificate	58	33
Citation	59	33
Affidavit of service	61	34
Order allowing writ of error	62	34
Bond on writ of error	64	35

1 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 6th day of March, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur March 7, 1903.

2 COLUMBIA BANK, Respondent,
ag'st
CLARENCE T. BIRKETT, Appellant.

Be it remembered, that on the 20th day of February in the year of our Lord one thousand nine hundred and two Clarence T. Birkett the appellant in this action came here into the court of appeals, by Thomas Carmody his attorney, and filed in the said court a notice of appeal and return thereto from the order & judgement of the appellate division of the supreme court in and for the first judicial department. And Columbia Bank, the respondent in said action, afterwards appeared in said court of appeals by I. S. Isaacs its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

3 Whereupon, the said court of appeals having heard this cause argued by Mr. J. Murray Downs of counsel for the appellant, and by Mr. Julius J. Frank of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgement of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

4 Therefore, it is considered that the said judgement be affirmed with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *March* 7, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

5 STATE OF NEW YORK:

Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

Appeal Book.

I. S. Isaacs, attorney for respondent, 27 Pine St., New York.
Thomas Carmody, attorney for appellant, Penn Yan, N. Y.
John Willett, of counsel, 30 Broad St., New York.

6 Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

This action was commenced on the 21st day of May, 1900, by the service of summons and complaint. The answer was served June 9, 1900. The action was brought to trial before Hon. John Proctor Clarke, justice of the supreme court, at a trial term of the supreme court, part II, held in and for the county of New York on the 20th day of February, 1901. A jury was waived by both parties.

On the 8th day of March, 1901, a decision in favor of the plaintiff and against the defendant, directing judgment as hereinafter stated, was duly filed by the court. On the 9th day of March, 1901, judgment was duly entered in favor of the plaintiff and against the defendant, for the sum of $961.06.

On the 21st day of March, 1901, a notice of appeal to the appellate division of the supreme court for the first judicial department was served by the attorney for the defendant upon the attorney for the plaintiff. The appeal was subsequently argued before the appellate division, and thereafter, and on the 12th day of November, 1901, the appellate division affirmed the judgment appealed from, and judgment of affirmance was entered in the New York county clerk's office on the 13th day of November, 1901.

7 Notice of appeal to the court of appeals was filed and served on the 6th day of December, 1901.

The above are the names of the original parties in full, and no change has taken place pending suit. Dated Penn Yan, N. Y., December 31, 1901.

THOMAS CARMODY,
Attorney for Defendant, Penn Yan, N. Y.

Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of New York.

Dated New York, May 15, 1900.

I. S. ISAACS,
Plaintiff's Attorney.

Office and post office address, 27 and 29 Pine street, borough of Manhattan, New York city.

8 Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The plaintiff complains of the defendant, and alleges, on information and belief:

I. That the plaintiff is, and at all the times hereinafter mentioned was, a domestic corporation, organized under the laws of the State of New York, transacting the business of banking in the city of New York.

II. That, at the time hereinafter mentioned, until the death of said Russell, defendant and one Calvin Russell were co-partners, doing business under the firm name and style of Russell & Birkett.

III. That, on or about the 15th day of February, 1899, the defendant and said Calvin Russell, in their said firm name, for value received, made and delivered their promissory note to the order of Manhattan Railway Advertising Co., whereby they promised, on

April 5th after date thereof, to pay to the order of said Manhattan Railway Advertising Co. the sum of seven hundred and fifty and no one-hundredths dollars at Columbia bank, New York.

IV. That thereafter, and before maturity of said note, said Manhattan Railway Advertising Co. duly endorsed said note, and the same, so endorsed, was, before maturity, delivered for value to the plaintiff, which is now the lawful owner and holder of said note.

V. That thereafter, and prior to the commencement of this action, the said Calvin Russell died.

VI. That no part of said note has been paid.

Wherefore, plaintiff demands judgment against the defend-
9 ant for seven hundred and fifty and no one-hundredths dollars ($750.00), with interest thereon from April 5, 1899, and the costs of this action.

I. S. ISAACS,
Attorney for Plaintiff.

Office and post office address, No. 27 Pine street, Manhattan borough, New York city.

(Verified May 15, 1900.)

Supreme Court, County of New York.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

The defendant, answering the plaintiff's complaint herein:—

I. Admits the allegations contained in the plaintiff's complaint.

II. This defendant, further answering said complaint, alleges that on or about the 15th day of April, 1899, and after the execution and delivery of the note mentioned in the complaint herein, the firm of Russell & Birkett, makers of said note, as co-partners, and Calvin Russell and this defendant, individually, who were the members of said firm of Russell & Birkett, filed their petition in bankruptcy in the United States district court for the northern district of New York, and were on that day duly adjudged bankrupts, pursuant to the provisions of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States,"
10 approved July 1, 1898; that thereafter, and on or about the 3d and 4th days of May, 1899, before Hon. Charles A. Hawley, referee in said bankruptcy proceedings and having jurisdiction thereof, a meeting of the creditors of said Russell & Birkett, and of the individual members thereof, was held at the village of Penn Yan, Yates county, N. Y., at which all persons having claims against the said firm of Russell & Birkett, or against the individual members thereof, were permitted to prove, and did prove, their claims as creditors in such bankruptcy proceedings. This defend-

ant further alleges, upon information and belief, that the said note mentioned in plaintiff's complaint, and constituting the plaintiff's cause of action herein, was duly presented before said referee in such proceedings, as a claim against the estate of said Russell & Birkett; that thereafter, and on or about the 12th day of September, 1899, at a term of the United States district court for the northern district of New York, held at the city of Utica, Hon. Alfred C. Coxe presiding, being the court having jurisdiction of said bankruptcy proceedings, the said firm of Russell & Birkett, co-partners, and this defendant individually, were duly discharged in said bankruptcy proceedings, pursuant to the provisions of the act of Congress above mentioned, and that, by such discharge, the said firm of Russell & Birkett, and this defendant individually, were duly discharged from all debts, claims, and obligations existing against them, or either of them, on said 15th day of April, 1899.

III. This defendant further alleges that the indebtedness alleged in the plaintiff's complaint accrued before the said 15th day of April, 1899, and was provable against the estate of the said Russell & Birkett in the bankruptcy proceedings hereinbefore set forth, and that, by the discharge of the said Russell & Birkett, and of this defendant individually, in said bankruptcy proceedings hereinbefore set forth, they, and each of them, as co-partners and individuals, were released and discharged from the payment of said claim, or any portion thereof, except as the same might be paid in the bankruptcy proceedings above referred to.

Wherefore, this defendant asks that the complaint herein be dismissed, with costs.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

(Verified June 9, 1900.)

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Notice of Findings.

Take notice that the decision, of which a copy is hereto annexed, was, on the 8th day of March, 1901, duly made and filed in the above-entitled action in the office of the clerk of the county of New York, and that on the 9th day of March, 1901, the same was duly annexed to and filed with the judgment roll herein, and the judg-

ment, of which a copy is hereto annexed, was, on said last
12 mentioned date, duly entered and filed herein in the office of the clerk of the county of New York.

Dated New York, March 11, 1901.

Yours, &c.,

I. S. ISAACS,
Attorney for Plaintiff.

27–29 Pine street, borough of Manhattan, city of New York.

To Thomas Carmody, Esq., attorney for defendant.

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Findings.

The issues of fact under the pleadings herein coming on to be tried by the court at a trial term, part II, held by the undersigned, and a jury trial having been waived by both parties to this action in open court, and the defendant having thereupon, in open court, withdrawn the allegation of the answer that the promissory note in suit was presented and proved in the bankruptcy proceeding therein alleged, and the issues having been tried by the court, without a jury, on the 20th day of February, 1901, and the allegations and the evidence of the parties having been heard—

Now, after hearing Julius J. Frank, Esq., of counsel for the
13 plaintiff, and Thomas Carmody, Esq., of counsel for the defendant, and due deliberation having been had, I decide and find as follows:

Findings of Fact.

I. That plaintiff is, and at all the times hereinafter mentioned was, a domestic corporation, organized under the laws of the State of New York, transacting the business of banking in the city of New York.

II. That at the times hereinafter mentioned, until the death of the hereinafter-mentioned Russell, defendant and one Calvin Russell were co-partners, doing business under the firm name and style of Russell & Birkett.

III. That, on or about the 15th day of February, 1899, the defendant and said Calvin Russell, in their said firm name, for value received, made and delivered their promissory note to the order of Manhattan Railway Advertising Company, whereby they promised, on April 5th after date thereof, to pay to the order of said Manhattan Railway Advertising Company the sum of seven hundred and fifty dollars ($750), at Columbia bank, New York.

IV. That thereafter, and before maturity of said note, said Manhattan Railway Advertising Company duly endorsed said note, and the same, so endorsed, was, before maturity, delivered for value to the plaintiff, which was, and still is, the lawful owner and holder of said note.

V. That thereafter, and prior to the commencement of this action, said Calvin Russell died.

VI. That no part of said note has been paid.

VII. That, prior to the date of maturity of said note, the defendant, and the said firm of Russell & Birkett, the makers of said note, had actual knowledge of the fact that the plaintiff was then the owner and holder of the same.

14 VIII. That thereafter, to wit, on the 13th day of April, 1899, said firm of Russell & Birkett, and this defendant, upon their own petition, were adjudicated bankrupts in the United States district court for the northern district of New York, and that, on September 12, 1899, said firm and said defendant were discharged in bankruptcy.

IX. That the claim of the plaintiff upon said promissory note, and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof, and the creditor of said bankrupt by reason thereof, and that such plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy, prior to the discharge of the bankrupts therein.

X. That no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them.

Conclusions of Law.

I. That the claim of the plaintiff, upon said promissory note, was not, and is not, barred or discharged by the defendant's said discharge in bankruptcy.

II. That there is now due and owing to the plaintiff from the defendant upon said promissory note the sum of seven hundred and fifty (750) dollars, with interest thereon from April 5, 1899, amounting to date to eighty-six and sixty-three one-hundredths (86.63) dollars, in all eight hundred and thirty-six and sixty-three one-hundredths dollars.

15 I accordingly direct judgment for the plaintiff against the defendant for eight hundred and thirty-six and sixty-three one hundredths dollars, together with an extra allowance of five (5) per cent. upon said amount, with costs, to be taxed.

JOHN PROCTOR CLARKE, *J. S. C.*

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Judgment.

The issues in this action having been regularly brought on for trial before Mr. Justice John Proctor Clarke, at a trial term, part II, of this court, held on the 20th day of February, 1901, at the New York county court house, in the borough of Manhattan, city of New York, and the court having heard the allegations and proofs of the parties, and the arguments of counsel, after due deliberation having duly made and filed, on the 8th day of March, 1901, a decision in favor of the plaintiff, against the defendant, containing a statement of the facts found, and the conclusions of law thereon, and directing judgment as hereafter stated, and the plaintiff's costs having been duly adjusted at the sum of one hundred and twenty-four and forty-three one-hundredths (124.43) dollars.

Now, on motion of I. S. Isaacs, attorney for plaintiff, it is—

Adjudged, that the plaintiff do recover judgment against
16 the defendant for eight hundred and thirty-six and sixty-three one-hundredths (836.63) dollars, principal and interest, together with one hundred and twenty-four and forty-three one-hundredths (124.43) dollars cost, including an extra allowance of five (5) per cent. upon said amount, in all nine hundred and sixty-one and six one-hundredths dollars, and that said plaintiff have execution therefor against said defendant.

Judgment signed and entered this 9th day of March, 1901.

WILLIAM SOHMER, *Clerk.*

Memoranda of Opinion by Clarke, J.

COLUMBIA BANK
vs.
BIRKETT.

This is an action on a promissory note. Defense a discharge in bankruptcy. Plaintiff seeks to avoid effect of discharge upon the ground that, under the provisions of subdivision 3 of section 17 of the bankruptcy act of 1898, this debt was not discharged because it was not duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt." The debt was scheduled, but the name of the creditor was not. The name in the schedule was the original payee. The proof established the fact that bankrupt knew plaintiff was holder of the note in question, and had applied for extension of time for payment from it. Plaintiff

received no notice of the bankruptcy proceedings, and acquired no knowledge thereof until long after the discharge pleaded and proved.

"The defendant had no right to altogether ignore the plaintiff
17 and his demand, unless he intended, as the act proclaims, that the plaintiff should not be bound by the proceedings in which he was so ignored." (Tyrrel *vs.* Hammerstein, 33 Misc., 505.) Judgment directed for the plaintiff for $750, with interest from April 5, 1899, costs, and extra allowance of five per cent. Submit findings.

Supreme Court, New York County.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Amended Exceptions.

The defendant, Clarence T. Birkett, excepts to the findings of fact and conclusions of law of the court herein, filed in the office of the clerk of the county of New York on the 9th day of March, 1901, as follows:

I. He excepts to so much of the ninth finding of fact therein in which the court finds "that the claim of the plaintiff upon said promissory note, and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

II. He excepts to so much of the ninth finding of fact
18 therein in which the court finds that the plaintiff was the creditor of the defendant at the time when the defendant's schedules in bankruptcy were filed, upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

III. He excepts to so much of the ninth finding of fact therein in which the court finds that the "plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy prior to the discharge of the bankrupts therein," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

IV. He excepts to so much of the tenth finding of fact in which the court finds "that no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them," upon the ground that said finding of fact is not supported by the evidence, and is against the weight of evidence.

V. He excepts to so much of the first conclusion of law in which

the court finds "that the claim of the plaintiff upon said promissory note was not, and is not, barred or discharged by the defendant's said discharge in bankruptcy."

Dated at Penn Yan, N. Y., this 20th day of March, 1901.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

19 Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

Notice of Filing.

To I. S. Isaacs, Esq., attorney for plaintiff, 27 Pine St., New York city.

SIR: Please take notice that the foregoing notice of exceptions to the report and findings of the court herein has been filed at the office of the clerk of the county of New York on the 21st day of March, 1901.

Dated at Penn Yan, N. Y., this 21st day of March, 1901.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

Supreme Court, New York County.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Notice of Appeal.

20 SIR: You will please take notice that the defendant, Clarence T. Birkett, hereby appeals to the appellate division, first department from a judgment of this court entered in the office of the clerk of the county of New York on the 9th day of March, 1901, for the sum of nine hundred sixty-one dollars and six cents ($961.06), damages and costs.

Dated at Penn Yan, N. Y., March 19, 1901.

Yours, &c.,
THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

To I. S. Isaacs, Esq., plaintiff's attorney, 27 Pine St., New York, and to William Sohmer, Esq., clerk of the county of New York.

Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

This action came on for trial at a trial term of the supreme court, part II, held in and for the county of New York, on the 20th day of February, 1901, before Hon. John Proctor Clarke, justice of the supreme court.

Plaintiff appeared upon the trial by Julius J. Frank, his counsel. Defendant appeared upon the trial by Thomas Carmody, his attorney, and John Willett, of counsel.

21 Jury waived by both parties.

Plaintiff moves for judgment upon the pleadings, upon the ground that, the defendant claiming the benefit of section 17 of the bankruptcy act of 1898, which section contains an exception to the operation of a discharge in bankruptcy, the defendant must plead and prove facts negativing the exeeption. There is no averment that the debt in question was duly scheduled with the name of the plaintiff, or that plaintiff's name was not known to the bankrupts, or that plaintiff had notice or actual knowledge of the proceedings in bankruptcy.

Defendant's counsel states that it will not be claimed by the defendant here that the note was presented. That was an error. The defendant will not be able to prove that the note was presented.

Counsel argue the motion for judgment.

The COURT: Is there any defense to the case?

Mr. CARMODY: We wish to introduce the schedules and notice to the payee.

The COURT: I think we had better take that, so as to put in the case, and the decision on the question of law will be reserved. I will take whatever evidence you have. The making of the note and the amount due is conceded, is it not?

It is conceded that the amount due upon the note upon which the suit was brought is $750 principal, and $84.38 interest, making a total of $834.38.

22 The plaintiff rested.

Mr. Carmody, on behalf of the defendant, offered in evidence an adjudication in bankruptcy in the United States district court, for the northern district of New York, in the matter of Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, bankrupts, made on the 13th day of April, 1899.

Received, and marked "Exhibit A."

Mr. Carmody, on behalf of the defendant, offered in evidence a discharge in bankruptcy in the matter of Calvin Russell and Clarence T. Birkett, as co-partners under the name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, dated the 12th day of September, 1899.

Received, and marked "Exhibit B."

CLARENCE T. BIRKETT, being duly sworn as a witness on behalf of the defendant, testified as follows:

I am the defendant. I was a member of the firm of Russell & Birkett, formerly of Penn Yan, N. Y.

Witness identifies schedules of the firm of Russell & Birkett in bankruptcy, filed in the United States district court April 13, 1899. Offered in evidence.

Same objection, ruling and exception.

Papers marked "Exhibit C."

From said schedules Mr. Carmody read in evidence from Schedule A (3), No. 32, of the liabilities of Russell & Birkett as follows: "Manhattan Railway Advertising Company, New York city. A promissory note dated February 15, 1899, due April 5, 1899, for the sum of $750." Received.

23 WITNESS: This is the note in suit here. The usual notice to creditors was mailed to the Manhattan Railway Advertising Company of the first meeting of creditors of Russell & Birkett.

Witness identifies notice. Notice offered in evidence by defendant. Received and marked, "Exhibit D."

Mr. Carmody offered in evidence a letter from The Columbia Bank, the plaintiff, to M. L. Baldwin, president of Baldwin's Bank of Penn Yan, N. Y., and Mr. Baldwin's answer thereon, as follows, the answer of Mr. Baldwin being written at the bottom of the letter from the plaintiff:

Columbia bank, Fifth avenue and 42d St.

NEW YORK, *Nov.* 6, 1899.

M. L. Baldwin, Esq., president Baldwin's Bank of Penn Yan, Penn Yan, N. Y.

DEAR SIR: Messrs. Russell & Birkett, of your city, who failed some time ago, are indebted to us in the sum of seven hundred and fifty dollars ($750) for a note we discounted.

We understood some little time ago that they were about to reorganize their business, and form a corporation, and were to give their creditors stock in the newly-organized company for their indebtedness.

Will you kindly inform us if these people have gone on in business, and, if not, what condition their affairs are in.

Thanking you in advance, and holding ourselves in readi-
24 ness to reciprocate the favor at any time, I remain,

Very truly yours, JOSEPH FOX, *Pres't.*

Mr. Baldwin's answer appears at the bottom of said letter, as follows:

"They have been through bankruptcy, and now C. T. Birkett, one of the old firm, is carrying on the business same as formerly. Doing a big business.

11-9-99 M. L. BALDWIN."

Received, and marked "Exhibit E."

Mr. Carmody offered in evidence a letter dated November 17, 1899, from the Columbia bank to M. L. Baldwin, Esq., president of Baldwin's Bank of Penn Yan, N. Y., and Mr. Baldwin's answer thereto, as follows:

Columbia bank, Fifth avenue and 42d St.

NEW YORK, *Nov.* 17, 1899.

M. L. Baldwin, Esq., president Baldwin's Bank of Penn Yan, Penn Yan, N. Y.

DEAR SIR: I received your reply to my letter of the 6th instant, for which I thank you, and desire to trouble you again, namely, to ask you in which district Russell & Birkett passed through bankruptcy, as we were not aware, and never received notification, that any such proceedings had taken place.

Thanking you again for the trouble I am putting you to, and always ready to reciprocate the favor, I remain,

Very truly yours, JOSEPH FOX, *Pres't.*

25 Mr. Baldwin's answer appears at the bottom of said letter, as follows:

"Northern district, N. Y. Charles A. Hawley, referee, Seneca Falls, N. Y. 11–18–99."

Received, and marked "Exhibit F."

It was conceded that Joseph Fox, who signed the above two letters, was at the time, and still is, the president of the plaintiff.

Cross-examination of Mr. BIRKETT by Mr. FRANK:

Witness shown letter dated March 27, 1899, addressed to Messrs. Russell & Birkett, Penn Yan, N. Y., and signed Manhattan Railway Advertising Company.

WITNESS: I received that letter at or about the time of its date.

Letter offered in evidence. Received, and marked "Exhibit 1," which is as follows:

Manhattan Railway Advertising Co., 30, 32, 34, 36 Park place, corner Church St.

NEW YORK, *March* 27, 1899.

Messrs. Russell & Birkett, Penn Yan, N. Y.

GENTLEMEN: Your favor of the 25th instant to hand, enclosing note maturing May 5th, $750, and exceedingly regret to learn of your misfortune in consequence of the damage sustained by fire to your mills. However, it is gratifying to know that you are fully covered by insurance, and trust your business will not be delayed in consequence.

26 Relative to the extension of your note now held by the Columbia bank, wish to say that we notified the president relative thereto, and he positively declines to grant another extension, notwithstanding our entreaties in your behalf. On the original extension it was granted only after considerable persuasion on our part, and you can readily see our position in the matter, as it is entirely out of our hands, and solely controlled by the bank now holding the note, and we therefore have to abide by their decision.

We regret we cannot aid you as much as we would like to, but it does not lay in our power to do so.

We return enclosed herewith note you sent us, and trust the time you have now prior to maturity will be ample for you to make provision for the payment of note now held by the bank, which matures April 5th.

Regretting our inability to be of service to you in this instance, we are,

Yours very truly,

MANHATTAN RAILWAY ADV. CO.

WITNESS: This note, which was referred to in this letter, and which matured April 5th, we obtained an extension on from the Columbia bank to the 12th of April.

Letter, produced by plaintiff, shown witness, dated April 4, 1899, signed Russell & Birkett, by C. T. Birkett.

WITNESS: That is my signature.

Letter offered in evidence. Received, and marked "Exhibit 2," and is as follows:

27 PENN YAN, N. Y., *April* 4, 1899.

The Columbia bank, New York city.

GENTLEMEN: Providing you will hold our note for $750, due at your bank to-morrow, April 5, 1899, without protest, until the 12th instant, we will endeavor to pay the same. Possibly before that date.

Yours truly,

RUSSELL & BIRKETT.
C. T. BIRKETT.

WITNESS: We filed our petition in bankruptcy on the 12th or 13th of April; the 13th of April, 1899, I think, we were adjudicated. That letter (referring to Exhibit 2), was not mailed to the Columbia bank.

By the COURT:

Q. I understood it was a letter to the Columbia bank?
A. It was not mailed to the Columbia bank.

By the COURT:

Q. It was addressed to them?
A. Yes, addressed to them.

By Mr. FRANK:

Q. You intended it to de delivered to the Columbia bank, didn't you?

A. It was immaterial to us to whom it was delivered.

By the COURT:

Q. The request was made to the Columbia bank, wasn't it?

A. No, the request was not made to the Columbia bank. It was made to the Manhattan Railway Advertising Co.

28 By the COURT:

Q. Who was it addressed to?

A. It was addressed to the Columbia bank.

By the COURT: It shows knowledge on his part. The purpose of it is that he knew the Columbia bank held this note.

Testimony closed.

By Mr. FRANK: Your honor will consider that we renew the motion for judgment made at the opening of the case.

By Mr. CARMODY: I make a motion to dismiss the complaint on all the evidence.

Decision reserved. Briefs to be submitted.

THOMAS CARMODY,
Attorney for Defendant.

Office and P. O. address, Penn Yan, N. Y.

EXHIBIT A.

In Bankruptcy. No. 942.

In the District Court of the United States for the Northern District of New York.

In the Matter of RUSSELL & BIRKETT, Co-partners, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

29 At Utica, N. Y., in said district, on the 15th day of April, A. D., 1899, before the Hon. Alfred C. Coxe, judge of said court in bankruptcy, the petition of Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, that Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, be adjudged a bankrupt within the true meaning and intent of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, is hereby declared and adjudged bankrupt accordingly.

Witness the Hon. Alfred C. Coxe, judge of said court, and
[L. S.] the seal thereof, at the city of Utica, in said district, on th
15th day of April, A. D., 1899.

CHARLES B. GERMAIN, *Clerk.*

Attest: CHARLES B. GERMAIN, *Clerk.*

A. C. C.

EXHIBIT B.

In Bankruptcy. No. 942.

Discharge of Bankrupt.

District Court of the United States for the Northern District of New York.

In the Matter of CALVIN RUSSELL and CLARENCE T. BIRKETT, as Co-partners under the Firm Name of RUSSELL & BIRKETT, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

30 Whereas, Calvin Russell and Clarence T. Birkett, as co-partners under the firm name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, of Penn Yan, in the county of Yates and State of New York, have been duly adjudged bankrupts under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and appears to have conformed to all the requirements of law in that behalf. It is, therefore—

Ordered, by the court, that said Calvin Russell and Clarence T. Birkett, as co-partners under the firm name of Russell & Birkett, and Calvin Russell and Clarence T. Birkett, individually, be forever discharged from all debts as co-partners and as individuals, and claims which by said act are made provable against their estate, and which existed on the 13th day of April, 1899, on which day the petition for adjudication was filed, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at the city of Utica, N. Y., in said district, this 12th day of September, A. D. 1899.

[L. S.] A. C. COXE, *Judge.*

Attest: CHARLES B. GERMAIN, *Clerk.*

EXHIBIT C.

SCHEDULE A (3), No. 32.—*Creditors Whose Claims Are Unsecured.*

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

RUSSELL & BIRKETT.

Reference to ledger or voucher.	Names of creditors and last holders known to debtors.	Residence, (if unknown, that fact must be stated.)	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner, or joint contractor with any other person, and, if so, with whom.	Amount.
None..... ...	Manhattan Railway Advertising Co.	New York city, N. Y.	Feb. 15, '99, Penn Yan, N.Y.	Advertising performed by creditors, and for which creditors hold debtors' note dated Feb'y 15, '99, due April 5, 1899, in the sum of $750.	$750.00

CALVIN RUSSELL,
CLARENCE T. BIRKETT, } *Petitioners.*

32 EXHIBIT D.

In Bankruptcy. No. 942.

In the District Court of the United States for the Northern District of New York.

In the Matter of RUSSELL & BIRKETT, Co-partners, and CALVIN RUSSELL and CLARENCE T. BIRKETT, Individually, Bankrupts.

To the creditors of Calvin Russell and Clarence T. Birkett, individually and as co-partners, lately doing business under the firm name and style of Russell & Birkett, of Penn Yan, in the county of Yates and district aforesaid, bankrupts:

Notice is hereby given that on the 15th day of April, 1899, the said Russell & Birkett, co-partners, and Calvin Russell and Clarence T. Birkett, individually, were duly adjudged bankrupts, and that the first meeting of their creditors will be held at the chambers of the county judge, in the county building, Penn Yan, Yates county, N. Y., on the 2d day of May, 1899, at 10 o'clock in the forenoon, at which time the said creditors may attend, prove their claims, appoint a trustee, examine the bankrupt, and transact such other business as may properly come before said meeting.

Dated April 17, 1899.

CHARLES A. HAWLEY,
Referee in Bankruptcy.

33 The foregoing case and exceptions, containing all the evidence, is hereby settled, signed, and ordered filed in the office of the clerk of the county of New York.

Dated Penn Yan, N. Y., April 16, 1901.

JOHN PROCTOR CLARKE,
Justice of the Supreme Court.

Supreme Court, Appellate Division, First Judicial Department.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

It is hereby stipulated by and between the attorneys for the respective parties in this action that the foregoing are true and correct copies and of the whole of each thereof, of the summons, complaint, answer, findings of fact, judgment, case and exceptions, opinion of the court, and notice of appeal, and that the same may be used upon the appeal to the appellate division of the supreme court herein, with the same force and effect in all respects as if duly and properly

certified by the clerk of New York county to be such copies as aforesaid, such certification being specifically waived.

Dated Penn Yan, N. Y., March 21, 1901.

I. S. ISAACS,
Attorney for Plaintiff-Respondent.
THOMAS CARMODY,
Attorney for Defendant-Appellant.

34 It is hereby consented that the foregoing printed case on appeal may be ordered on file as and for the original case on appeal, as settled herein.

Dated Penn Yan, N. Y., April —, 1901.

I. S. ISAACS,
Attorney for Plaintiff-Respondent.
THOMAS CARMODY,
Attorney for Defendant-Appellant.

It is so ordered.

Dated New York, April —, 1901.

JOHN PROCTOR CLARKE, *J. S. C.*

Endorsed: (" Filed April —, 1901.")

Supreme Court.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

Take notice that an order, of which the within is a copy, was, on the 12th day of November, 1901, duly entered and filed in the office of the clerk of the appellate division of the supreme court, first department, and that a certified copy thereof, transmitted according to law to the county clerk of the county of New York, was, on the 13th day of November, 1901, duly filed in said clerk's office.

Dated New York, Nov. 13, 1901.

Yours, &c.,

I. S. ISAACS,
Plaintiff's Attorney.

27–29 Pine street, New York city.

To Thomas Carmody, Esq., defendant's attorney.

35 At a term of the appellate division of the supreme court, first department, held at the appellate division court house, in the county of New York, on the 8th day of November, 1901.

Present: Hon. C. H. Van Brunt, P. J., Hon. Edward Patterson, Hon. George Ingraham, Hon. Edward W. Hatch, Hon. Frank C. Laughlin, J. J.

COLUMBIA BANK, Plaintiff-Respondent,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

The defendant having appealed to the appellate division, supreme court, first department, from the final judgment herein, entered in the office of the clerk of the county of New York, the 9th day of March, 1901, and said appeal duly coming on to be heard—

Now, after hearing Mr. Willett, of counsel for the appellant, in support of said appeal, and Mr. Frank, of counsel for respondent, in opposition thereto, and due deliberation having been had thereon, it is, on motion of I. S. Isaacs, Esq., attorney for respondent—

Ordered, that the judgment so appealed from be, and the same hereby is, affirmed, with costs to the respondent.

WILLIAM SOHMER, *Clerk*.

36 Supreme Court.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant having appealed to the appellate division of the supreme court, first department, from a judgment of the supreme court herein, entered in the office of the clerk of the county of New York on the 9th day of March, 1901, and said appellate division of the supreme court having duly made an order dated November 8, 1901, and entered November 12, 1901, affirming said judgment, with the costs of said appeal to the plaintiff-respondent, and a certified copy of said order, transmitted according to law, having been duly filed in the office of the clerk of said county, and respondent's costs having been taxed this day at the sum of one hundred and one and seventy-two one-hundredths dollars—

Now, on motion of I. S. Isaacs, Esq., attorney for the plaintiff, it is—

Adjudged, that the judgment so appealed from be, and the same hereby is, affirmed, and that the plaintiff, Columbia Bank, recover of the defendant, Clarence T. Birkett, the sum of one hundred and one and seventy-two one-hundredths dollars, costs, and that said plaintiff have execution therefor.

Judgment signed and entered November 13, 1901.

[SEAL.] WILLIAM SOHMER, *Clerk*.

37 Supreme Court, New York County.

COLUMBIA BANK
against
CLARENCE T. BIRKETT.

YATES COUNTY, *ss:*

Thomas Carmody, being duly sworn, says: He is the attorney for the defendant in the above-entitled action; that no opinion was written by the appellate division on the decision of the above case on appeal therein.

THOMAS CARMODY.

Sworn to before me this 19th day of December, 1901.

KATHLEEN L. CAVISTON,
Notary Public.

New York Supreme Court, New York County.

COLUMBIA BANK, Plaintiff-Respondent,
against
CLARENCE T. BIRKETT, Defendant-Appellant.

Notice of Appeal to the Court of Appeals.

Take notice that the above-named defendant hereby appeals to the court of appeals from the order of the appellate division of the supreme court, first department, in this action, entered in the office of the clerk of said court on the 8th day of November, 1901, and from the judgment of this court entered in the office of the
38 clerk of the county of New York on the 13th day of November, 1901, which said order and judgment affirmed the judgment entered herein in favor of the plaintiff on the 9th day of March, 1901, and from each and every part of said order and judgment.

Dated New York, December 6, 1901.

Yours, &c.,
THOMAS CARMODY,
Attorney for Defendant-Appellant.

Office and P. O. address, Penn Yan, N. Y.

To the clerk of the county of New York.
To I. S. Isaacs, Esq., attorney for plaintiff-respondent, 27 Pine St., New York.

Court of Appeals.

COLUMBIA BANK, Respondent,
against
CLARENCE T. BIRKETT, Appellant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in this action, that the foregoing are true and correct copies, and of the whole of each thereof, of the summons, complaint, answer, notice of findings, findings of fact and conclusions of law, judgment, memoranda of opinion by Clarke, J., at the trial term, amended exceptions to findings and notice of filing, notice of appeal to the appellate division, case and exceptions,
39 stipulation to case at appellate division, order of affirmance in appellate division, and notice of entry and filing, judgment of affirmance and notice thereof in appellate division, and notice of appeal to the court of appeals, and that the same may be used upon the appeal to the court of appeals herein with the same force and effect in all respects as if duly and properly certified by the clerk of the county of New York to be such copies as aforesaid, such certification being specifically waived.

Dated Penn Yan, N. Y., December 31, 1901.

I. S. ISAACS,
Attorney for Respondent.
THOMAS CARMODY,
Attorney for Appellant.

40 At a special term, part II, of the supreme court of the State of New York, held in and for the county of New York, at the New York county court house, in the borough of Manhattan, city of New York, on the 8th day of March, 1903.

Present: Honorable Samuel Greenbaum, justice.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant above named having appealed to the court of appeals from the order of the appellate division of the supreme court, first department, in this action entered in the office of the clerk of said court on the 8th day of November, 1901, and from the judgment of the supreme court herein entered in the office of the clerk of the county of New York on the 13th day of November, 1901, and said appeal having been duly heard by the court of appeals upon due notice of said appeal and the return thereof, and the court of appeals having on the 6th day of March, 1903, ordered and adjudged that the judgment of the appellate division of the supreme court appealed from, be affirmed with costs to plaintiff, and having directed the record aforesaid and the proceedings in said court of

appeals to be remitted to this court hereto be proceeded upon according to law,

41 Now, on filing the remittitur of the court of appeals herein, dated March 7th, 1903, and

On motion of J. S. Isaacs, plaintiff's attorneys, it is

Ordered and adjudged that the order and judgment aforesaid of the court of appeals, be and the same hereby are made the order and judgment of this court, and that the judgment aforesaid entered upon the order of the appellate division of the supreme court, first department, in the office of the clerk of the county of New York, on the 13th day of November, 1901, be and the same hereby is, affirmed with costs of said appeal to the court of appeals, to the plaintiff above named to be taxed by the clerk of this court.

Enter.

S. G., *J. S. C.*

42 [Endorsed:] New York supreme court. Columbia Bank, plaintiff, *vs.* Clarence T. Birkett, defendant. Judgement order on remit-itur. I. S. Isaacs, 27 & 29 Pine St., New York city.

43 Supreme Court, County of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

The defendant above named having appealed to the court of appeals from the judgment in favor of the plaintiff entered upon the order of the appellate division of the supreme court, first department, herein in the office of the clerk of the county of New York on the 13th day of November, 1901, and the court of appeals having ordered that the said judgment appealed from be affirmed, and having sent down the remittitur to this court here to be proceeded upon according to law, and this court by order *fated* March 18th, 1903, and entered this day in the office of the clerk of the county of New York, having directed judgment to the following effect and plaintiff's costs of said appeal to the court of appeals having been taxed this day at the sum of one hundred and fifty-two dollars and 51/100,

Now, on motion of J. S. Isaacs, plaintiff's attorneys it is—

Adjudged that the judgment so appealed from be, and the same hereby is, affirmed and that the plaintiff Columbia Bank recover from the defendant Clarence T. Birkett the sum of one hud*n*red and fifty-two and 51/100 dollars costs, and the said plaintiff have execution therefor.

Judgment signed and entered, March 18th, 1903.

THOS. L. HAMILTON, *Clerk.*

44 [Endorsed:] New York supreme court, Columbia Bank plaintiff *vs.* Clarence T. Birkett defendant. Judgement of affirmance. I. S. Isaacs 27 & 29 Pine St. New York city.

45 COLUMBIA BANK, Respondent,
v.
CLARENCE T. BIRKETT, Appellant.

(Decided March 6, 1903.)

The action is upon a promissory note for $750; dated February 15th, 1899, and payable April 5th, 1899; made by the firm of Russell & Birkett, of which defendant is the surviving member, to the order of the Manhattan Railway Advertising Company and by the payee transferred to the plaintiff before maturity. Defendant set up in his answer the discharge of his firm in bankruptcy proceedings. The case being tried without a jury, findings of fact were made; which, after stating the formal facts of the making of the note, its acquisition by the plaintiff by indorsement of the payee, before maturity and for value, and its non-payment, proceeded to find that prior to the maturity of the note, the makers "had actual knowledge of the fact that plaintiff was then the owner and holder of the same;" that Russell & Birkett, upon their own petition, were adjudicated bankrupts on April 13th, 1899, and on September 12th, 1899, were discharged in bankruptcy; that "the claim of the plaintiff upon said promissory note and the debt of said firm of Russell & Birkett, and of said defendant, upon said promissory note to the plaintiff, were not duly scheduled in time for proof and allowance, with the name of the plaintiff, which, at the time of filing their schedules in bankruptcy, was known to the bankrupts to be the owner and holder thereof, and the creditor of said bankrupts by reason thereof, and that such plaintiff had no notice or actual knowledge, or other knowledge, of said proceedings in bankruptcy, prior to the discharge of the bankrupts therein." It was, also, further found "that no notice of any of said proceedings in bankruptcy was at any time given to the plaintiff by, or by the direction of, said bankrupts, or either of them." As his legal conclusion, the trial judge found that the plaintiff's claim was not, and is not, barred, or discharged, and he directed judgment for the plaintiff. This judgment was affirmed by the appellate division, in the first department, and the defendant has appealed to this court.

J. Murray Downs, and Thomas Carmody, for appellant.

Julius J. Frank, and I. S. Issaacs, for respondent.

GRAY, *J.*:

The appellant does not dispute that the findings of fact are supported by the evidence; but he does dispute that they support the legal conclusion. Indeed, the evidence, upon which the finding as to the defendant's knowledge of plaintiff's ownership and holding of the note is based, leaves no doubt possible as to that fact. The note was due April 5th, 1899. On March 27th, 1899, in response to a request of the defendant's firm for an extension of their note, its payee, the advertising company, informed them that it was held by

the plaintiff, whose president refused to give any extension. Thereupon, and on April 4th, the firm wrote to plaintiff that if it would hold their note "due at your bank to-morrow * * * until
46 the 12th instant, we will endeavor to pay the same." Their petition in bankruptcy was filed April 13th, and in their schedule of creditors they inserted, under the heading of "Names of creditors and last holders known to debtors," the payee named in the note and not the plaintiff. In the following September, they obtained the decree discharging them from their debts. In the following November, the plaintiff's president wrote to the president of a bank in Penn Yan, N. Y., making inquiry about the firm of Russell & Birkett and "what condition their affairs are in." Upon hearing, in reply, that they had "been through bankruptcy," plaintiff's president asked, "in which district Russell & Birkett passed through bankruptcy, as we were not aware and never received notification that any such proceedings had taken place." He then learned that the proceedings were in the northern district of New York. However singular those facts, we are not further concerned with them; as we are not assuming, in this action, that the defendant was guilty of fraud in procuring his discharge in bankruptcy. The contention of the defendant is that, notwithstanding the facts, his discharge is a perfect defense to this action, and that involves a construction of the present Federal bankruptcy act, which was passed in 1898. Section 17 of that act provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice, or actual knowledge of the proceedings in bankruptcy," etc. The argument is made that, although the plaintiff had no notice, or actual knowledge, of the bankruptcy proceedings prior to the discharge, by subdivision N of section 57, claims may be proven within a year after the adjudication in bankruptcy, and when, in November, 1899, following the defendant's discharge, the plaintiff learned of that fact, that it had still five months left to make proof of its claim. Then reference is made to section 15 of the act, whose provisions allow a discharge to be revoked, upon the application of parties in interest, filed within a year from the discharge, for fraud of the bankrupt, etc., and, from these provisions of the Federal statute, it is inferred, and it is insisted, that no substantial rights of the plaintiff have been affected and that, within the intent of the act, it was bound by the decree in bankruptcy and its claim is barred.

While there may be some difficulty in the way of the statutory construction, I think the plaintiff's claim has never been discharged, as the result of the bankruptcy proceedings. In my opinion, there are features in the present bankruptcy act, which differentiate it from preceding acts and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy. It is provided that the voluntary bankrupt must file "a list of his creditors, showing their residences, if

known," and that notices must be sent to the creditors at
47 "their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed * * * by the creditors." (Sec. 58*a* and sec. 7, subd. 8.) While in the previous acts of 1841 and of 1867, substituted service of notices by publication was provided for, in the present act, it is actual notice that is required to be given. The schedule of debts, which the bankrupt is to file with his petition, furnishes the basis for the notices which the referee, or the court, is to give thereafter to the creditors, and, thus, the bankrupt appears to be made responsible for the correctness of the list of his creditors. That he is to suffer, in the case of his failure to state the name of the creditor, to whom his debt is due, if known to him, seems to me very clear from the reading of section 17 of the act. That *excepts* from the release of the discharge all debts which "have not been duly scheduled in time for proof and allowance, with the name of the creditor." That is very emphatic language, and how is it possible to obviate its effect by the argument that the plaintiff still had time left, after the discharge was granted, to prove his claim? The excepting clause of the act excludes from the bankrupt's discharge debts, which "*have not been* duly scheduled in time for proof," etc. Can we say that such debts as *may* be proved within a year from the adjudication in bankruptcy are discharged? I think, clearly, not The present act, differing in such respects from the preceding acts, requires strict notification of the various steps in the bankruptcy proceedings to be given to the creditors of the voluntary bankrupt, according to his schedule, and it excepts from the release of the bankrupt's discharge provable debts, which had not been duly scheduled, etc. I think it was intended that the decree discharging the voluntary bankrupt should be confined in its operations to the creditors, who had been duly listed and who were enabled to receive the notices which the act provides for.

Nor can I agree with the suggestion that is made that plaintiff's substantial rights were not affected. Whether that is a necessary factor in the case, I do not say; but they certainly were, in my opinion. The plaintiff enjoyed none of the opportunities provided by the act for the creditors of a debtor who is seeking a discharge from his debts; such as the selection of a trustee, or the examination of the bankrupt, as preliminary to opposition to the discharge. Those were rights accorded by the act, and I am quite unable to perceive how it can be held that the plaintiff could be deprived of them and remitted for all remedy to an attack upon the decree of discharge.

For these reasons, I advise the affirmance of the judgment, with costs.

VANN, *J.* (dissenting):

The trial court found that, upon his own petition, the defendant was adjudged a bankrupt on the 15th of April, 1899, and was discharged in bankruptcy on the 12th of September following; that

the claim of the plaintiff was not duly scheduled in its name in time for proof and allowance, and that it had no notice or knowledge of the proceedings in bankruptcy prior to such discharge.

48 The court did not find that the plaintiff did not know of the proceedings in bankruptcy in time to prove its claim and have it allowed, but simply that it had no knowledge until after the discharge was granted. The uncontradicted evidence, consisting of the plaintiff's letters, showed that it knew that the defendant was in bankruptcy, and as early as the 18th of November, 1899, had specific information as to the name and address of the referee in charge. The plaintiff, then, had five months within which to prove its claim.

The debt in question was for goods sold to the bankrupt and his copartner and the evidence thereof was a note given by them to the vendor therefor, which became due on the fifth of April, 1899. It was duly scheduled in the name of the vendor, but not in the name of the plaintiff bank, to which it had been transferred, as the defendant knew.

The national bankruptcy act, approved July 1st, 1898, provides that "any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending." The judge upon hearing the application "and such proofs and pleas as may be made in opposition thereto by the parties in interest," must discharge the applicant, unless he has violated certain specified provisions of the act. (§ 14.)

The judge may revoke the discharge "upon the application of parties in interest who have not been guilty of laches, filed at any time within one year after a discharge shall have been granted," provided it was obtained through fraud, that knowledge thereof "came to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge." (§ 15.)

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;* or (4) were created by his fraud, embezzlement, misappropriation or defalcation, while acting as an officer or in any fiduciary capacity." (§ 17.)

A certified copy of an order granting a discharge "shall be evidence of the jurisdiction of the court, the regularity of the proceedings and of the fact that the order was made." (§ 21, par. f.)

Claims may be proved and allowed against a bankrupt's estate at any time within one year after the adjudication. (§ 57.)

Creditors are entitled to "at least ten days' notice by mail
49 to their respective addresses as they appear in the list of creditors of the baukrupt," of all examinations of the bankrupt, hearings upon application for discharge and all meetings of creditors, declarations of dividends, etc. (§ 58.)

The amendments made by the act of February 5, 1903, are not alluded to, as they are not material in this controversy. General order number eleven, made by the Supreme Court of the United States as authorized by the act, provides that the schedules may be amended, but it does not specify the time within which the amendment may be allowed.

A discharge in bankruptcy is presumptive evidence that every provable debt contracted prior to the date when the petition was filed is discharged thereby. A debt created by the purchase of goods on credit, whether merged in a promissory note given therefor or not, is provable under the act. (§§ 17 and 57.) In order to defeat the discharge, not only duly pleaded and proved by the defendant but found by the court, the burden of proof was upon the plaintiff to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge. This was the rule under prior bankruptcy acts, which excepted certain debts from the operation of a discharge, and there is no reason why it should not be applied to the one now in force. (Sherwood *v.* Mitchell, 4 Denio, 435; Brereton *v.* Hull, 1 Denio, 75; McCabe *v.* Cooney, 2 Sand. Ch. 347, 352; Harrison *v.* Lourie, 49 How. Pr. 124, 128; Stevens *v.* King, 16 App. Div. 377; Chapman *v.* Forsyth, 2 How. [U. S.] 202, 208; Cutter *v.* Folsom, 17 N. H. 139, 149; Johnson *v.* Ball, 15 N. H. 407; Brown *v.* Broach, 52 Miss. 536, 541; Bump on Bankruptcy [11th ed.], 725; Collier on Bankruptcy [3rd ed.], 202; Potter's Dwarris on Statutes, 118; Sedgwick's Stat. Con. 50.)

In Sherwood *v.* Mitchell, Judge Jewett, speaking for the court said: "When a cause of action or matter of defense under a statute is pleaded, which statute contains a proviso or exception in the same substantive clause on which the action or defense is founded, although the declaration or plea must deny that the cause of action or defense is within the proviso or exception, yet it is not necessary for the party to prove the negative; but it rests with the other party to prove the affirmative. * * * The discharge is presumptive evidence of all the facts asserted in it, and is conclusive until overthrown by evidence of some fact which by the act avoids it. Debts arising out of a violation of an official or private trust are not affected by it, unless the creditor chooses to prove the demand under the bankruptcy. The discharge, it is true, is general in its terms, and *prima facie* is a discharge of the bankrupt from all his debts. But the creditor may, notwithstanding, show that his debt is of the excepted class. The *onus*, however, is on him, and if he fails to make the proof, the debt will be taken to be one of an ordinary character."

In McCabe *v.* Cooney, Vice Chancellor Sanford said: "Nor do I

think it necessary for the answer to allege that the complain-
50 ant's debt was not within the excepted debts which are excluded from the operation of the law. That fact, like any other matter, intended to avoid the effect of the discharge, must be shown by the complainant. In support of the answer the certificate of the defendant's discharge is sufficient evidence for him until it is impeached or avoided."

In Chapman *v.* Forsyth the court said: "From these considerations, we are led to say in answer to the third question, that, unless a fiduciary creditor shall come into the bankrupt court, prove his debt, etc., he is not bound by the discharge, but may sue for and recover his debt from the discharged bankrupt, by showing that it was within one of the exceptions of the first section."

While the cases are not uniform upon the subject, according to the decided weight of authority it is not necessary for the defendant to prove a negative by showing that the debt is not one of those excepted by the act, but it is necessary for the plaintiff to show as an affirmative fact in answer to the plea of a discharge in bankruptcy that the debt sued upon falls within the exceptions. Any other rule would be clumsy and inconvenient, for it would require the defendant to prove the negative of at least a dozen propositions. The plaintiff in this action failed to meet the burden of proof which the law casts upon it. There was neither a finding, nor evidence to warrant a finding that the debt was one of those excepted by section seventeen. While it appeared that the debt was not scheduled in the name of the plaintiff, it also appeared that it was scheduled in the name of the payee of the note and the vendor of the goods for which the note was given, and that notice of the bankruptcy proceedings was given accordingly. Furthermore, it appeared that the plaintiff had actual knowledge of the proceedings in bankruptcy, in time to prove its debt and to apply for a revocation of the discharge.

Thus the discussion is narrowed to the real meaning of paragraph three of section seventeen, which I repeat for convenience; debts are not discharged which "have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The failure to schedule is not conclusive, for if the creditor had knowledge of the proceedings in bankruptcy it does not affect the discharge. While the statute does not, in terms, provide the date when notice must be given or knowledge acquired in order to take the debt out of the exception, the context shows that it must be "in time for proof and allowance." The words last quoted show the reason upon which the exception is founded and indicate the time when notice or knowledge must come to the creditor in order to do away with the exception. The object of the act is to discharge the debtor from his provable debts, and the object of proving a debt is to enable the creditor to share in the distribution of the estate. If he has time for that, the statute

is satisfied and the debt is discharged, whether he actually
51 proves his debt or not. If the court should hold that any other date is meant, the construction would be arbitrary and without foundation in the language of the statute, which must be the sole guide. One case is cited which is directly in point upon the question under discussion. In Fider v. Manheim (81 N. W. Rep. 2) the action was upon a promissory note and the answer plead a discharge in bankruptcy. Before the defendant was adjudged a bankrupt he knew that the note had been transferred to the plaintiff, but, notwithstanding, he scheduled the note as held by the original payee and no notice was given to the plaintiff in the bankruptcy proceedings. It appeared, however, that the plaintiff had actual knowledge of such proceedings in time to prove his claim and have it allowed, and the court held that the note was barred by the subsequent discharge in bankruptcy.

While in the case before us the plaintiff lost the right to oppose the application for a discharge, it did not lose the right to apply to revoke it, if any ground existed therefor, which is not suggested. Moreover, if the statute means that paragraph three of section seventeen does not apply when the creditor knew of the bankruptcy proceedings in time to prove his claim, the loss of the right to resist the discharge in the first instance does not enable the plaintiff to take advantage of a technical omission to defeat the primary object of a great remedial act, which is to relieve honest debtors from the burden of their debts, so that they can start in business again and add to the wealth of the country.

I think that the findings of fact, even when supported by the usual presumptions in aid of a judgment, do not sustain the conclusions of law and, hence, that the judgment should be reversed and a new trial granted, with costs to abide event.

Parker, Ch. J., O'Brien, Bartlett, Haight and Cullen, JJ., concur with Gray, J.; Vann, J., reads dissenting opinion.

Judgment affirmed.

52 UNITED STATES OF AMERICA, *ss:*

[Seal of U. S. Circuit Court, South. Dist. New York.]

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the supreme court of the State of New York to which court the record and judgment of the court of appeals of the State of New York was remitted in accordance with the law and practice of the said State of New York, said record and judgment remaining in said supreme court of the State of New York, the said court of appeals being the highest court of law or equity of the State in which a decision could be had in the said suit between The Columbia Bank, plaintiff, and Clarence T. Birkett, defendant,

wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute or of an authority exercised under the said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question *or* construction of a clause of the said Constitution, or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said Clarence T. Birkett, as by his complaint appears, we being willing that
53 error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of March in the year of our Lord one thousand nine hundred and three.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court,
Southern District of New York.

Allowed by
ALTON B. PARKER,
Chief Judge of the Court of Appeals.

54 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Writ of error Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York Rec'd Apr. 2 1903 Thos. L. Hamilton clerk

55 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

To the Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York:

And now comes Clarence T. Birkett by Thomas Carmody, Esq., his attorney, and complains that in the record and proceedings, and

also in the rendition of a judgment — a plea in the suit betwee
The Columbia Bank, plaintiff, and Clarence T. Birkett, defendant
which is in the court of appeals of the State of New York, bein
the highest court of law and equity of the said State in which a de
cision could be had, and the said court of appeals having rendere
the decision affirming a judgment theretofore rendered in th
supreme court of the State of New York on the 13th day of Novem
ber, 1901, which judgment affirmed the judgment of the trial teru
of the supreme court of the State of New York rendered on the 9t
day of March, 1901, in favor of the said plaintiff and against th
said defendant for the sum of $836.63, together with $124.43
56 costs, amounting in all to the sum of $961.06, and that th
plaintiff have execution therefor against the said defendan
and which said decision of the court of appeals was, according t
the rules and practice of the said court, together with the record o
the said judgment, remitted by the said court of appeals in to th
supreme court of the State of New York before the justices thereo
according to the form of the statute in such case made and provided
to be enforced according to law and which record now remains i
said supreme court before the justices thereof, and which said re
mittitur was entered in the office of the clerk of the supreme cour
of New York county on the 18th day of March, 1902, and judgmen
entered thereon, making the judgment and decision of the court o
appeals the judgment of the supreme court of the State of New York
and wherein was drawn in question the validity of the statute an
of an authority exercised under the United States, and the decisio
is against their validity and wherein a right was claimed under th
Constitution and also under the statute of the United States, and th
decision was against the right specially set up and claimed, all o
which appears in the record and proceedings in said suit, manifes
error has happened to the great damage of the said Clarence T
Birkett.

Wherefore, the said Clarence T. Birkett, by his attorney aforesaid
prays for an allowance of a writ of error and such other process a
may cause the said error to be corrected by the Supreme Court o
the United States.

Dated, March 21st, 1903.

THOMAS CARMODY,
Attorney for Clarence T. Birkett, Defendant.

Office and post-office address, Penn Yan, N. Y.

57 [Endorsed:] New York supreme court Columbia Bank
vs. Clarence T. Birkett Petition for writ of error Thomas
Carmody defendant's attorney Office & P. O. address Penn Yan
New York Rec'd Ap'l 2 1903

58 STATE OF NEW YORK, }
County of New York. }

Clerk's office of the supreme court of the State of New York for the county of New York.

I, Thomas L. Hamilton clerk of the county of New York and of the supreme court of the State of New York, for the said county of New York, by virtue of the annexed writ of error which was served upon me on the 2nd day of April 1903 and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 42 inclusive contain a true and complete transcript of the record and proceedings had in said court in the suit Columbia Bank *vs.* Clarence T. Birkett mentioned in said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for said writ of error, the citation to the writ in error with proof of service of the same, the said writ of error served upon me with a copy of the opinion of the court of appeals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York, on the 13th day of April 1903.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*

59 UNITED STATES OF AMERICA, ss:

To the Columbia Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to the writ of error in the clerk's office of the New York supreme court in a suit wherein The Columbia Bank is defendant-in-error, and Clarence T. Birkett is plaintiff-in error, to show cause, if any there be, why the judgment rendered against the said Clarence T. Birkett, plaintiff-in-error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alton B. Parker, chief judge of the court of appeals the 30th day of March, in the year of our Lord, one thousand nine hundred and three.

ALTON B. PARKER,
Chief Judge Court of Appeals.
M. J. D.

60 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Citation Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York Rec'd Apr. 2 1903 Thos. L. Hamilton c'k

61 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BUKETT, Defendant.

STATE OF NEW YORK,
County of New York, } ss:

Thomas Downs, being duly sworn says he is over the age of twenty one years and that he served a copy of the petition, order and writ of error, citation and bond on writ of error on W. S. Griffith the cashier of The Columbia Bank the above named plaintiff on the 31st day of March, 1903 by delivering copies of the above named papers to said cashier in his office in the above named bank at 501 Fifth Ave., borough of Manhattan, city of New York and leaving the same with him. Deponent further says he knew the person so served to be the cashier of the Columbia bank.

THOMAS DOWNS.

Sworn to before me this 31st day of March, 1903.

ANNA T. MALLON,
Notary Public 40, *Kings Co.*

Cert. filed in N. Y. Co.

62 Supreme Court, State of New York.

COLUMBIA BANK, Plaintiff,
against
CLARENCE T. BIRKETT, Defendant.

In this cause application having been made to Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York, for an allowance of a writ of error to remove such cause to the Supreme Court of the United States for review in accordance with the Constitution and laws of the United States and the rules and practice of the Supreme Court of the United States, and for the fixing and approving of the bond on removal of said cause to the Supreme Court of the United States, it is hereby

Ordered that said writ of error be and the same is hereby allowed, and the same may be issued by any officers authorized to issue the same, and the penalty in the bond is hereby fixed at the sum of $2000.00, with Laura R. Birkett and Clarence H. Ferenbaugh as sureties thereon.

ALTON B. PARKER,
Chief Judge, Court of Appeals.

Dated, March 25th, 1903.

63 [Endorsed:] New York supreme court Columbia Bank *vs.* Clarence T. Birkett Order for writ of error Thomas Carmody defendant's attorney Office & P. O. address Penn Yan New York

64 Know all men by these presents: That we, Clarence T. Birkett of the village of Penn Yan, Yates county, and State of New York, as principal, and Laura R. Birkett of the same place, and Clarence H. Farenbaugh residing at Dresden, in the county of Yates and State of New York, by occupation a miller, as sureties, are held and firmly bound unto Columbia Bank of the City of New York, in the full and just sum of two thousand dollars ($2000) to be paid to the said Columbia Bank, its attorney, successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors or assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 23rd day of March, 1903.

Whereas, on or about the 6th day of March, 1903, at a session of the court of appeals of the State of New York, in a suit pending in said court between Columbia Bank, plaintiff and respondent, and the said Clarence T. Birkett, defendant and appellant, a decision was rendered against the said defendant affirming a judgment of the supreme court of the State of New York; and the said defendant Clarence T. Birkett having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the decision in the aforesaid suit; and a citation directed to the said Columbia Bank citing and admonishing it to be and appear at a term of the Supreme Court of the United States at Washington, D. C., within thirty days from the date thereof;

65 Now, the condition of the above obligation is such, that if the said Clarence T. Birkett shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CLARENCE T. BIRKETT. [L. S.]
LAURA R. BIRKETT. [L. S.]
CLARENCE H. FERENBAUGH. [L. S.]

STATE OF NEW YORK, } ss:
County of Yates, }

On this 23rd day of March, 1903, before me, the subscriber, personally appeared Clarence T. Birkett, Laura R. Birkett and Clarence H. Ferenbaugh, to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally duly acknowledged to me that they executed the same.

JOHN T. KNOX,
Yates County Judge.

STATE OF NEW YORK, } ss.:
County of Yates, }

Laura R. Birkett, being duly sworn, says that she is a resident of the State of New York and a free holder therein; that she is worth the sum of four thousand dollars over and above all the debts which she owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

LAURA R. BIRKETT.

Sworn to before me this 23rd day of March, 1903.

JOHN T. KNOX,
Yates County Judge.

66 STATE OF NEW YORK, } ss.:
County of Yates, }

Clarence H. Ferenbaugh, being duly sworn, says that he is a resident of the State of New York and a free holder therein; that he is worth the sum of four thousand dollars over and above all the debts which he owes or has incurred, exclusive of property exempt by law from levy and sale under an execution.

CLARENCE H. FERENBAUGH.

Sworn to before me this 23rd day of March, 1903.

JOHN T. KNOX,
Yates County Judge.

Form 9.

No. 33.

STATE OF NEW YORK, } ss.:
County of New York, }

I, Thomas L. Hamilton, clerk of the said county and clerk of the supreme court of said State for said county, do certify, that I have compared the preceding with the original bond on writ of error on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original.

Indorsed filed Ap'l 22d 1903.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 22d day of Ap'l 1903.

[Seal of New York.]

THOS. L. HAMILTON, *Clerk.*

67 [Endorsed:] Copy New York supreme court Columbia Bank *vs.* Clarence T. Birkett Bond on writ of error Thomas Carmody defendant's att'y Office and post-office address, Penn Yan, N. Y.

Endorsed on cover: File No. 18907. New York supreme court. Term No. 267. Clarence T. Birkett, plaintiff in error, *vs.* The Columbia Bank. Filed April 27, 1903. File No. 18907.

Supreme Court of the United States.

No. ~~267~~ 26, October Term, 1903.

Clarence T. Birkett, plaintiff-in-error,
against
The Columbia Bank, defendant-in-error,

On motion of Mr. Frederic D. McKenney, in behalf of counsel for the plaintiff-in-error,

It is now here ordered by the court that cause be shown by The Columbia Bank before this court, at the city of Washington, on Tuesday, February 23, 1904, at 12 o'clock, noon, of that day, or as soon thereafter as counsel can be heard, why an order should not be made restraining said The Columbia Bank from further enforcement of the judgment entered in this cause by the Supreme Court of the State of New York.

It is further ordered that pending the determination of this order to show cause the said The Columbia Bank and the sheriff of the county of Yates, in the State of New York, are and each is hereby restrained and stayed from any enforcement of the said judgment.

February 1, 1904.

A true copy.

Attest: JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Seal of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error, against THE COLUMBIA BANK, defendant-in-error,	*No 267.*

United States of America, State of New York, County of Albany, ss.:

Robert G. Scherer, being duly sworn, deposes and says that he is an attorney-at-law residing in the city of Albany, N. Y., and admitted to practice in the United States Supreme Court. That he is also one of the attorneys of record for Clarence T. Birkett, the plaintiff-in-error in the above-entitled action.

That the above-entitled action is brought into this court for review by a writ of error to the supreme court of the state of New York. That the above appeal is an appeal from the judgment of the supreme court of the state of New York in favor of The Columbia Bank and against Clarence T. Birkett, which judgment of the supreme court was affirmed by the court of appeals by an order made on the 7th day of March, 1903, affirming the judgments of the court below and remitting the case to the supreme court for further action; that the remittitur was filed in the office of the clerk of the county of New York and a judgment was entered thereon on the 18th day of March, 1903, making the judgment of the court of appeals the judgment of the supreme court. That thereupon and on the 21st day of March, 1903, the plaintiff-in-error filed his petition, praying that a writ of error be allowed to the United States Supreme Court, and on the 30th day of March, 1903, Hon. Alton B. Parker, chief judge of the court of appeals, made an order directing that a writ of error be allowed to the United States Supreme Court, and further directed that a bond be given in the sum of two thousand dollars ($2,000), being for more than twice the amount of the judgment and costs, with Laura R. Birkett and Clarence H. Farenbaugh as sureties thereon, and on the 30th day of March,

1903, the said chief judge of the court of appeals issued a citation to The Columbia Bank requiring them to show cause why the judgment should not be corrected and why speedy justice should not be done to the parties in that behalf. That on the 25th day of March, 1903, the plaintiff-in-error executed a bond with Laura R. Birkett and Clarence H. Farenbaugh as sureties, to the Columbia Bank of the city of New York in the penal sum of two thousand dollars ($2,000), and that the said bond was duly signed, sealed and executed by the said principal and sureties and duly acknowledged, and to the same was appended the affidavits of the said Laura R. Birkett and Clarence H. Farenbaugh, qualifying in the sum of four thousand dollars ($4,000). That the amount of the judgment entered in the supreme court of the state of New York in favor of The Columbia Bank against Clarence T. Birkett, was the sum of $961.06. That the said writ of error, citation and original bond were duly filed in the office of the clerk of the supreme court of the county of New York in the office wherein the judgment sought to be reviewed is entered and wherein the record on appeal is entered. That a copy of the said petition of said Clarence T. Birkett, the order allowing the writ and fixing the amount of the bond with the sureties, the writ of error, the citation and bond were duly personally served on The Columbia Bank on the 31st day of March, 1903; that the clerk of the supreme court of the state of New York, in pursuance of the said writ of error has made a return to the clerk of the United States Supreme Court of the record in the above-entitled action, and the same is now on file in this court and is No. 267 of the October term. That notwithstanding the above proceedings, the said Columbia Bank on the 26th day of December, 1903, issued an execution to the sheriff of the county of Yates wherein the plaintiff-in-error resides and has his place of business, and on the 28th day of December, 1903, the sheriff of the county of Yates levied the said execution upon the property of the plaintiff-in-error.

That as your deponent is informed and believes the issuance of the bond with the approval thereof by the chief judge of the court of appeals, the filing of the same in the office of the clerk of the

supreme court of the county of New York and service thereof, and of copies of all the papers personally of the defendant-in-error, The Columbia Bank, constitute a *supersedeas* and stay of proceedings upon the said judgment and *supersedeas*. That the said execution is issued without authority of law and in violation of the said *supersedeas* to the great injury of the plaintiff-in-error.

Wherefore, the plaintiff-in-error prays that an order be made staying the execution of the said judgment in all things, and that The Columbia Bank be required to show cause at a term of this court to be held at the Capitol in the city of Washington, D. C., on the day of February, 1904, why all proceedings on said judgment should not be stayed pending the determination of the above-entitled appeal by the Supreme Court of the United States, or for such other and further relief, writ of *supersedeas* or stay as may be just and proper in the premises.

ROBERT G. SCHERER.

Sworn to before me this 30th
day of January, 1904.

ANNA E. BURKE,
Com. of Deeds, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

State of New York, County of Yates, ss.:

Thomas Carmody being duly sworn, says he is an attorney and counselor-at-law, and resides in the village of Penn Yan in said county and State; that on the 13th day of February, 1904, he served a copy of an order in the above-entitled action bearing date the 1st day of February, 1904, a copy of which is hereto

annexed, upon the sheriff of the county of Yates, by delivering to and leaving with him personally a true copy thereof, at his office, in said village of Penn Yan.

THOMAS CARMODY.

Sworn to before me, this 13th day
of February, 1904.

KATHLEEN L. CAVISTON,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

State of New York, City and County of New York, ss.:

Wm. Thos. Rushford being duly sworn, says that he is over 21 years of age; that deponent personally served the annexed order to show cause in the above-entitled action on the following-named defendant therein mentioned, at the time and place herein specified, as follows: On The Columbia Bank, at 501 Fifth avenue, New York city, N. Y., on the 5th day of February, 1904, by delivering to and leaving with Walter S. Griffith, cashier of said defendant, personally, a true copy of said order to show cause, and deponent further says that he knew the person so served to be the cashier of said corporation mentioned and described in the said order to show cause, as defendant therein.

WM. THOS. RUSHFORD.

Sworn to before me, this 6th day
of February, 1904.

HOWARD CAMPBELL,
Notary Public, Kings Co.,
Certificate filed in New York Co.

SUPREME COURT OF THE UNITED STATES.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error,

Affidavit of Service.

State of New York, County of New York, ss.:

Wm. Thos. Rushford, of the city of New York, being duly sworn, says that he is 21 years of age and upwards, and that on the 5th day of February, in the year one thousand nine hundred and four, he personally served a copy of the annexed order to show cause on Isaac S. Isaacs, at 52 William street, New York city, by delivering to and leaving with said Isaac S. Isaacs, personally, a true copy thereof.

WM. THOS. RUSHFORD.

Sworn to before me, this 6th day
of February, 1904.

HOWARD CAMPBELL,
Notary Public, Kings Co.,
Certificate filed in New York Co.

Office Supreme Court
FILED
FEB 23 190
JAMES H. McKENNEY,
C

Supreme Court of the United States.

CLARENCE T. BIRKETT, plaintiff-in-error,
against
THE COLUMBIA BANK, defendant-in-error.

No. 26.

This is an application for an order restraining the defendant-in-error from enforcing the judgment appealed from.

The appeal is from a judgment of the court of appeals of the state of New York affirming a judgment of the supreme court of the state of New York, and the question presented for determination involves the construction of the bankruptcy law.

The plaintiff-in-error sued out his writ of error and gave a bond for a *supersedeas* and believed that the enforcement of the judgment was thereby effectually stayed until the determination of the appeal, but recently the defendant-in-error issued execution to the sheriff of Yates county, wherein the plaintiff-in-error now resides, to levy on the property of the plaintiff-in-error. The sheriff has made a levy on the property and is about to sell the same.

An application was made to this court on the 1st day of February, 1904, and an order was granted on that day staying the enforcement of the judgment appealed from and requiring the defendant-in-error to show cause on the 23d day of February, 1904, why it should not be restrained and stayed from enforcing the judgment pending the determination of this appeal.

The chronological order of the proceedings in this appeal are as follows:

1903, March 7th — Decision of the court of appeals rendered. (Transcript, page 1.)

1903, March 8th — Order entered in the supreme court making the order of the court of appeals the order of the supreme court. (Transcript, page 22 [40].)

1903, March 18th — Judgment entered in the county clerk's office of New York county upon the remittitur of the court of appeals. (Transcript, page 23.)

1903, March 21st — Petition for writ of error prepared. (Transcript, pages 31 and 32.)

1903, March 23d — *Supersedeas* bond in the sum of $2,000 executed by plaintiff-in-error, with two sureties justifying in the sum of $4,000 each. (Transcript, pages 35 and 36.)

1903, March 30th — Order made by chief justice of the court of appeals of the state of New York allowing the writ of error, fixing the amount of the bond and approving the same. (Transcript, page 34.)

1903, March 30th — Citation signed by chief judge of the court of appeals. (Transcript, page 33.)

1903, March 30th — Writ of error allowed by chief judge of the court of appeals and signed by him and (March 31) by the clerk of the United States circuit court, southern district of New York. (Transcript, page 31.)

1903, March 31st — Copy of petition, order for writ, writ of error, citation and bond were personally served on defendant-in-error. (Transcript, page 34.)

From this it is evident that the writ of error was allowed by Chief Judge Parker of the court of appeals March 30, 1903, just twelve days after the judgment appealed from was signed and entered in the office of the clerk of the supreme court of the county of New York, and that that order fixed the amount of the bond, named the sureties, and approved the same. The affidavit of service of these papers shows that on March 31, 1903, after the judgment appealed from was entered in the office of the clerk of the county of New York, that all of these papers including the bond were personally served on the defendant-in-error.

The defendant-in-error had not issued any execution up to that time and did not issue execution until the 26th day of November, 1903.

It is, therefore, submitted, and for the following reasons, that the plaintiff-in-error prosecuted his appeal with all due diligence, and that the enforcement of the judgment appealed from should be stayed, pending the hearing and determination of this appeal.

POINT I.

The practice on appeals in the courts of the state of New York is as follows: Where an action is tried in the supreme court at trial term, an appeal from a judgment may then be taken to the appellate division of the supreme court of the state of New York. From that court an appeal lies to the court of appeals of the state of New York. When the appeal is taken from the appellate division of the supreme court to the court of appeals, the clerk of the supreme court sends the record to the court of appeals of the state of New York, and after that court has made its decision it issues under the hand of its clerk and the seal of the court what is known as a remittitur, remitting the case, together with the record on appeal to the supreme court. The record and the remittitur are then filed in the office of the clerk of the supreme court of the county wherein the action was originally tried; an order is made at special term of the supreme court making the order of the court of appeals the order of the supreme court. The judgment is then entered on that order, making the judgment of the court of appeals the judgment of the supreme court, and then, and not until then, is the judgment creditor entitled to enforce his judgment by the issuance of an execution. The record remains for all time in the office of the clerk of the supreme court. Hence, the writ of error in this case properly ran to the supreme court of the state of New York (Gelston v. Hoyt, 3 Wheat., 247; McGuire v. Commonwealth, 3 Wall., 387; Atherton v. Fowler, 91 U. S., 143), and the writ of error was properly

allowed by the chief judge of the court of appeals, that being the highest court of the state of New York.

United States Revised Statutes.

§ 1003. Writs of error from the supreme court to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

§ 1000. Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff-in-error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as aforesaid.

§ 1007. In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of (the said term of sixty) (ten) days.

Rules of the United States Supreme Court, No. 29.—Supersedeas.

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff-in-error or appel-

lant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

"A *supersedeas* is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of congress in that behalf. We are not required, therefore, to issue any writ to perfect the rigt of a party to that which the law has given him; but if the court below is proceeding, through a mistake or otherwise, to execute its judgment or decree notwithstanding the *supersedeas*, we may, under section 716 of the Revised Statutes, issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise."

Goodard v. Ordway (94 U. S., 672).

In that case the motion was for the writ of *supersedas*.

In Telegraph Company v. Eyser (19 Wall., 419) the judgment was affirmed by the supreme court of the territory of Colorado on September 6, 1873. On the eighth of October following the defendant sued out a writ of error returnable to the United States supreme court; it was duly served and returned. On the

last-mentioned day a citation was served on the adverse party and a *supersedeas* bond in the sum of $12,000 conditioned and approved according to law was filed in the proper office there. The plaintiffs-in-error, in their petition, represented that the defendant-in-error applied to the supreme court of the territory for an order that execution issue on the judgment, notwithstanding the writ of error and the *supersedeas* bond, and that they were apprehensive that such an order would be made.

In that case it was held that where the writ of error was sued out and the bond served within sixty days after the rendition of the judgment appealed from, it constituted a *supersedeas*. "It is expressly declared that the *supersedeas* bond may be executed within sixty days after the rendition of the judgment, and later, with the permission of the designated judge. It is not said when the writ of error shall be served. Its issuance must, of course, precede the execution of the bond; and, as the judge who signs the citation is still required to take the bond, we think it is sufficiently implied that it may be served at any time before or simultaneous with the filing of the bond. Indeed the giving of the bond alone is made the condition of the stay."

In Covington Stock Yards v. Keith (121 U. S., 248) it was held that "As the appeal was taken within sixty days after the rendition of the decree, Mr. Justice Matthews, the justice of this court, assigned to the sixth circuit, has power, under section 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made."

In this case the judgment complained of was entered in the office of the clerk of the county of New York on the 18th day of March 1903. (Transcript, page 23.) The petition for a writ of error was signed March 21, 1903 (Transcript, pages 31-32), and a bond was executed on the 23d day of March, 1903, in the sum of $2,000 in the form required by law, the sureties qualifying in the sum of $4,000 each. (Transcript, pages 35-36.) An order was made on the 30th of March, 1903 (Transcript, page 34) by the chief judge of the court of appeals of the State of New York allowing the writ of error and directing that a

bond be given in the sum of $2,000 with designated sureties. The writ of error was sued out and the writ, citation and bond were personally served on the Columbia Bank on the 31st day of March, 1903. (Transcript, page 34.) No execution had been issued out at that time. The plaintiff-in-error proceeded promptly observing the form prescribed by the United States Revised Statutes. He then sued out his writ of error, obtained a citation, gave the bond directed by the chief judge of the court of appeals. Every formality of the statute has been complied with and copies of all of these papers were personally served on the defendant-in-error and the clerk of the supreme court of the state of New York has made the return to the clerk of this court and the case is now on the calendar, and at this late date an execution has been issued and levied on the judgment complained of. It is submitted that an order should be made staying all proceedings on the part of the defendant-in-error and requiring him to show cause why a writ of *supersedeas* should not issue or such other writ as may stay the judgment complained of. (Kitchen v. Randolph, 93 U. S., 86.) It may be claimed that the bond was not approved by the judge who issued the citation but it will be seen that the bond was executed before the order was made allowing the writ, and that the order directing the allowance on the writ required a bond in the sum of $2,000 with the same sureties who executed the bond. From the transaction alone it would seem that the bond had been approved by Chief Judge Parker. A formal approval in writing is not required.

In Davidson v. Lanier (4 Wallace, at page 454), it was held "The judiciary act does not, in terms, require that the judge shall put his approval of the bond in writing, nor can a writ of error be treated as a nullity because sufficient security is not given." In that case the judge allowing the writ and issuing the citation did not formally approve the bond in writing, nor did it appear that he executed any judgment touching the security. He was an attesting witness to the signatures on the bond and the court said, "It is also urged that the appeal bond was not approved by the judge, but it is a fair inference from the acts of

the judge in signing the citation and in witnessing the appeal bond that he approved of the security." What was actually done in this particular case was the bond was presented to the chief judge and when he made the order allowing the writ, fixing the penalty of the bond and naming the sureties, he did it with the bond before him, and it was the supposition of the attorneys for the plaintiff-in-error that it not only constituted, but was the correct practice for the approval of the bond.

POINT II.

The writ of error was sued out within sixty days after rendition of judgment sought to be reviewed, and all the other proceedings were actually taken within that time. Moreover, copies of the petition for the writ, the writ of error, the order allowing the writ of error and approving the bond, the citation and the bond were personally served on the defendant-in-error (Transcript, page 34 [61]) within thirteen days after the rendition of the judgment and nearly eight months before the execution was issued. The plaintiff-in-error acted promptly and in good faith and he is desirous of having this judgment reviewed and is willing to give any bond the court may see fit to require for the purpose of staying the enforcement of this judgment until the determination of the appeal in this court. It may be said that no assignment of error was returned with the transcript of the record. This, however, does not deprive the court of jurisdiction and is not a ground for dismissal. (Gumbel v. Pitkin, 113 U. S., 545.)

It may be claimed that no copy of the writ of error was left with the clerk, but the writ was actually issued by the clerk for the southern district of New York under his seal and a copy of the writ was personally served on the defendant-in-error within thirteen days after the rendition of the judgment complained of; so the defendant-in-error has suffered no harm in any way. Moreover, the clerk of the supreme court of the State of New York certifies (p. 33 of Transcript) that "annexed hereto is the peti-

tion for said writ of error, the citation to the writ in error with proof of service of the same, the said writ of error served upon me with a copy of the opinion of the court of appeals." (Gumble v. Pitkin, 113 U. S., 545, 546, 547.) It has been amply secured and did not issue its execution until some eight months after the appeal was taken.

It is, therefore, submitted that the judgment of the court below was properly stayed, and such a writ should be made as will prevent any further proceeding on this judgment.

ROBERT G. SCHERER,
J. MURRAY DOWNS,
Attorneys for plaintiff-in-error.